



November 18, 2005

Ms. Elizabeth Fox
Senate Committee on Environment and Public Works
415 Hart Senate Office Building
Washington, D.C. 20510

Dear Ms. Fox:

Thank you for your letter requesting information to supplement the written testimony provided earlier to your committee. I hope that you will find this additional information and perspective useful as the Senate considers updating the Endangered Species Act (ESA).

The comments are in large part based on our experience in local and state government with Natural Community Conservation Plans (NCCPs). To a large extent, NCCPs work within the existing ESA. They treat listed, candidate, and "at risk" species as if all were listed as endangered, and implement a landscape-level plan that conserves those species at biologically sustainable population levels. By conserving these umbrella species, entire habitats can be protected. The challenge comes in practice, which is where the lessons we have learned in ten years of NCCP experience may be most useful to Senators scrutinizing proposed changes to the ESA.

I have paraphrased each question for convenience. My responses follow in italics.

Questions from Senator Chafee

- 1) What ESA changes could help provide state and local governments with the tools necessary for assisting in species recovery?

For California to meet ESA's objectives without severe economic hardships, our best hope is to expand NCCP planning, which would benefit from the continuation of the local assistance grants that have helped fund the NCCP planning efforts over the last ten years. These grants are a very efficient use of public money, based on the statistics provided by local government plan participants. State and federal funding has been matched many times over by local government exactions and private land dedications. For example, in San Diego County, the federal government contributed \$35 million to the NCCP from 1997-2004. In the same period, that funding leveraged dedications of private land valued at \$486 million, and the expenditure of \$36 million in County general funds. State investment in the same period totaled \$80 million. These grants have been administered under strict oversight, generally at the multi-jurisdictional level. All grants are requested yearly and progress reports required.

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We applaud the performance analysis the Office of Management and Budget has been preparing, because it will show that these large plans provide economies of scale. Cooperative planning agreements were signed between the United States Fish and Wildlife Service (USFWS), California Department of Fish and Game (CDFG) and local governments that spell out responsibilities and provide for funding assistance through the Cooperative Endangered Species Fund (Section 6) and other local assistance sources.

Some additional suggested ways for ESA to better support NCCPs are provided in the answer to Sen. Chafee's next question.

- 2) Are there aspects of the NCCP that could be incorporated into legislation to encourage HCP focus on both mitigation and recovery?

Acting under the assumption that the NCCP concept is the best path, there are several congressional actions that could be taken to improve the plans.

First is to codify the "No Surprises" assurances policy. No Surprises was developed for the Southern California NCCP pilot program, to motivate landowners and local jurisdictions to participate, and has been very effective. Many landowners have told us that without these assurances, they would not participate in the NCCP process and would pursue other remedies which frankly would not promote the large-scale solutions of the NCCPs.

The second NCCP-based action would be to employ the California ESA's conservation standard for covered species, to ensure that recovery actions become integral to carrying out NCCPs.

A third essential element of NCCP success is the ability to employ offsite mitigation for impacts to species. Since NCCPs are done at a landscape level, mitigation is often the only way to "complete the puzzle" of a preserve plan. We understand that for some regulated industries, offsite mitigation may be detrimental, so its use should be voluntary.

Fourth, the state NCCP program provides a mechanism for utilities to obtain take authorizations for the rare instances when their operations and maintenance activities may lead to impacts to protected species. The federal government has an opportunity to improve on the way infrastructure providers can assure safe and reliable service by expanding and codifying a safe harbor policy for water, electric, and natural gas providers. It is likely this change could benefit Southern states recovering from recent hurricanes, and California's efforts to achieve levee stabilization.

Fifth, the use of the low impact HCP approach should be expanded. These special HCPs provide a way for applicants such as local governments, water districts, flood

control districts, utilities and Indian tribes to undertake necessary, ongoing maintenance activities. No one should have to mitigate for impacts more than once.

Sixth, we support the elimination of the critical habitat provisions of the ESA in favor of a more useful approach. The designation of critical habitat appears to provide no benefit to the NCCP process; in practice, the process diverts scarce USFWS staff and funding away from the much more productive NCCP conservation effort, and can be a disincentive to voluntary participation in NCCPs by private landowners. Since NCCPs inherently address recovery actions, critical habitat and the associated obligatory recovery plans become redundant in NCCP planning areas.

- 3) With "No Surprises" staying intact, would you support creating a fund to pay for monitoring and adaptive management?

Yes, but should the Senate consider such a fund, its members should realize that the fund could be matched by local or state funds and could apply only to NCCP-type HCPs. Many confuse the meaning of "No Surprises." It is simply a tool that allows participants to bracket their financial exposure before committing to NCCPs long term stewardship obligations. Even public utilities with low impact activities benefit from the business planning stability that the "No Surprises" policy provides. The "Changed Circumstances" provisions in today's NCCPs and HCPs protect the CDFG and USFWS from the costs associated with such predictable events like drought, fire, floods and even pestilence.

Questions from Senator Inhofe:

- 1) What steps can be taken to ensure HCPs are meaningful and binding management documents for both state and federal entities?

Since NCCPs are prepared jointly by state and federal governments, they have the same Covered Species list, thereby eliminating the problem cited in the question. The plans are binding under the existing state and federal legal frameworks and compliance and enforcement have not been an issue. California has a provision in its Fish and Game code that provides that a permit obtained from the U.S. Fish and Wildlife Service to take species also applies to the state. Each state should have a similar reciprocity provision in its regulations.

- 2) What additional steps can states take to ensure that the state or local entities are adequately involved in the process where any new listing, recovery or delisting decisions are made by the federal government? Should the federal government be required to seek local input when considering listing, recovery and delisting actions?

Because local governments are usually the holders of the take permits from the California Department of Fish and Game, their involvement is essential to the success

of NCCPs. Landowners get their permits to take state or federally-listed species as part of their local land use approvals: in effect, "one-stop shopping" is created.

Federal listing, recovery and delisting decisions should always be made in the context of local and state actions that support, are neutral, or jeopardize rare species. The public review process for such actions can be a venue for input. As a result of our NCCPs, California has been able to prevent the listing of species that are already being treated and protected as if they were listed. These species benefit from the recovery actions that are inherent in the NCCPs.

Your question did not specifically address public involvement, but it may be helpful to point out that California's NCCP Act mandates a public involvement process to allow all interested parties to provide input. Public input is also solicited for NCCP-mandated planning agreements, that bind the parties to a defined process. The public process and providing the basis for collaboration is the real secret of NCCP success- the parties start working together early in the planning process, so major issues can be addressed before they can threaten successful completion. For example, in San Diego, it became clear well before the mapping and preserve design process was finalized that an assurances policy was going to be needed to buttress landowner and local government cooperation. From that collaboration, a strong consensus of support emerged and helped lead to the formulation of "No Surprises" assurances.

- 3) What incentives are needed and how can the ESA be amended to engage small landowners in habitat protection?

This question should be expanded to include all parties affected by habitat protection issues. A number of incentives that lead to beneficial effects for species are available to improve landowner participation, including safe harbors and working landscape policies and, of course, NCCPs. The existing safe harbor policy and nascent working landscape policies should be expanded and better codified to provide assurances that ongoing activities, if conducted according to agreed-upon protocols, are not deleterious to rare species.

As an example of how partnering with landowners can work, we have discovered that modest changes to work practices frequently can have significant beneficial results. For example, rice farmers in the Sacramento Delta, instead of burning chaff yearly, can leave the stubble in the fields, flood them, and thereby provide critical forage and stopover territory for migratory waterfowl. The waterfowl eat the chaff and their waste fertilizes the soil for next year's crop. Air pollution is cut and also water for the rice crop is put to wildlife use.

We also have found that utility rights of way and access roads can serve as important linkages for wildlife preserve planning. By coordinating road grading, tree trimming and other maintenance practices, utilities can eliminate most of the potential negative effects on rare species: in fact, intermittent scheduled maintenance activities, such as

on levees and other types of infrastructure, can have the effect of enhancing habitat for rare species like the Quino checkerspot butterfly that require periodic habitat disturbance.

As a way to build support for regional habitat conservation planning, special treatment for low effect, albeit frequent, impacts from infrastructure providers should be included in the tools available to state and local governments. Not only can rights of way be valuable as preserve connections, many times, large capital projects provide opportunities for mitigation packages which can help establish a regional wildlife preserve. For example, the expansion of a water reservoir can lead to the set aside of compensatory habitat in large blocks elsewhere, while allowing jurisdictions to meet their obligations to provide a safe and reliable water supply.

In NCCPs, a public participation process is required and can be used to engage small property owners. Many public meetings and mailers to landowners preceded the adoption of Southern California's NCCPs. In those meetings, the benefits of the CDFG and USFWS delegation of permitting authorities were explained and the economies of scale demonstrated. In essence, by combining forces, local governments are able to leverage their land use authority to simplify the federal and state permitting processes and incorporate the needs of species in local general plans.

- 4) What role do/should state and local governments have in the decision-making process for endangered species protection? Would it produce a better result if the federal government worked with local and state interests on a plan that benefits the species and the community while staying consistent with project goals? Should the ESA decision-making process be open to the public?

The federal government's expertise clearly is needed in ESA decision-making, but the NCCP program shows the benefits of federal, state and local jurisdictions working together to achieve successful large-scale habitat conservation planning. To the extent ESA can be reformed to encourage this sort of cooperative effort, other states may benefit as California has.

Using the best available scientific information should always be the standard. Unfortunately, it doesn't always happen, as the Klamath and other cases of abuse of discretion or scientific method have demonstrated. A more transparent scientific process that draws on state and local expertise can help improve the scientific process, as could the establishment by the Secretary of Interior of clear and enforceable standards for the scientific decision-making process to be used with ESA.

The federal government can also assist state and local jurisdictions by supporting peer review efforts. When decisions are made without peer review, costly mistakes can occur. However, for the approved plans in Southern California, a paid, locally-

established scientific advisory panel provided a forum for careful scrutiny of the conservation planning principles under consideration. The scientists on the panel were drawn from regional universities and were known for their expertise. Having a panel of professional equals minimized the ability of any one agenda to sway a discussion. The scientific bases of the NCCP in Southern California have not been challenged.

The scientific underpinning of NCCPs is ongoing. Monitoring programs are carried out under strict protocols that monitor habitat health, species populations and other factors, so management practices can be adjusted to improve outcomes. Local governments and arguably, state governments, do not have funding available for such rigorous scientific oversight. The federal government may wish to consider supporting a locally-generated scientific review process in return for a jurisdictions' participation in NCCP-type landscape level habitat conservation plans.

Qualified local participants should have a say in listing decisions and all information used in making such decisions needs to be available for review by any and all interested parties. One reason the NCCPs are successful is the transparency of the program.

You will find that many of the insights that we've shared with the Committee in my testimony and this follow up letter are common experiences of the other participants and the many publications written about NCCP. In particular, I refer you to one collection of case studies by Johnson, Swanson, Herring, and Greene. 1999. *Bioregional Assessments—Science at the Crossroads of Management and Policy*, Washington, D.C., Island Press. This collection of case studies includes a useful chapter on NCCP in Southern California. Should you seek more information of that nature, please do not hesitate to ask.

We appreciate your openness to the ideas we offer for your consideration and look forward to an expansion of the dialogue on how California's NCCP might provide the Senate with a helpful model as it considers updating the Endangered Species Act.

Sincerely,



Karen Scarborough
Undersecretary
Resources Agency, State of California

cc. Dan Skopec, Deputy Cabinet Secretary
Mike Chrisman, Secretary for Resources, State of California
Ryan Broddrick, Director Department Fish and Game, State of California